Endnotes

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University of Texas Southwestern Medical Center v. Nassar: Undermining the National Policy Against Discrimination

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UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER v. NASSAR: UNDERMINING THE NATIONAL POLICY AGAINST DISCRIMINATION

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> *"[F]ear of retaliation is the leading reason why people stay silent about the discrimination they have encountered or observed."*[1]

In *University of Texas Southwestern Medical Center v. Nassar*,[2] the Supreme Court of the United States for the first time addressed the causation standard governing retaliation claims under Title VII of the Civil Rights Act of 1964[3] and required proof of but-for causation.[4] In so ruling, the Court adopted a rigid tort law causation standard that inhibits an employee's ability to prove retaliation, thereby disadvantaging employees seeking to defend their civil rights.[5] The Court's decision cripples Title VII protections because enforcement of Title VII's antidiscrimination provisions can only be effective if employees are shielded from reprisal.[6] As a result, *Nassar* effectively undermines the national policy against discrimination.[7]

I. THE CASE

This case stems from actions the petitioner, University of Texas Southwestern Medical Center (the "University"), took against the respondent, Dr. Naiel Nassar, in connection with an employment dispute.[8] To prove the University's actions were retaliatory, Dr. Nassar needed to estab-

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1. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534–35 (2013) (Ginsburg, J., dissenting) (internal quotation marks omitted).

2. 133 S. Ct. 2517 (2013).

3. 42 U.S.C. §§ 2000e–2000e-17 (2006 & Supp. 2012).

4. *Nassar*, 133 S. Ct. at 2533.

5. *See infra* Parts IV.A–B.

6. *See infra* Part IV.C.2.

7. *See infra* Part IV.

8. Nassar v. Univ. of Tex. Sw. Med. Ctr., No. 3:08-CV-1337-B, 2010 WL 3000877, at *1 (N.D. Tex. July 27, 2010), *vacated*, Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448 (5th Cir. 2012).

lish the causal link between the motivations of the University and the adverse employment action that befell him.[9]

The University is an institution within the University of Texas system that specializes in medical education and is affiliated with Parkland Memorial Hospital (the "Hospital").[10] The affiliation agreement between the University and the Hospital dictates that the Hospital employ University faculty members as staff physicians.[11] Dr. Naiel Nassar, an Egyptian-born Muslim,[12] was employed by both the University, as a faculty member, and by the Hospital, as a medical doctor.[13]

Dr. Beth Levine, the University's Chief of Infectious Disease Medicine, arrived in 2004 as Dr. Nassar's second-line supervisor at the University.[14] Immediately upon assuming her role as Chief, Dr. Levine allegedly discriminated against Dr. Nassar by questioning his "productivity and billing practices"[15] and by subjecting him to greater scrutiny than his peers.[16] In addition, Dr. Nassar alleged that Dr. Levine made derogatory comments about Middle Easterners.[17] On more than one occasion Dr. Nassar told Dr. Gregory Fitz, Dr. Levine's supervisor,[18] that he believed Dr. Levine harassed him.[19]

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9. Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 454 (5th Cir. 2012), *vacated*, 133 S. Ct. 2517 (2013).

10. *Id.* at 450.

11. *Id.* at 451.

12. *Nassar*, 2010 WL 3000877, at *1.

13. *Nassar*, 674 F.3d at 450. Dr. Nassar was initially hired by the Hospital in 1995 "to work in [its] Amelia Court Clinic," "which specializes in HIV/AIDS treatment." *Id.* After working as a clinician for three years, Dr. Nassar resigned from his position to pursue additional training at the University of California, Davis. *Id.* Dr. Nassar returned to the University in 2001 as an Assistant Professor of Internal Medicine and Infectious Diseases and as Associate Medical Director of the Hospital's Amelia Court Clinic ("Clinic"). *Id.*

14. *Id.* Dr. Nassar's first-line supervisor was Dr. Phillip Keiser, Professor of Internal Medicine and Medical Director of the Clinic. *Id.*

15. *Id.* "[After] [Dr.] Keiser presented [Dr.] Levine with objective data demonstrating [Dr.] Nassar's high productivity, [Dr.] Levine began criticizing [Dr.] Nassar's billing practices. Her criticism did not take into account that [Dr.] Nassar's salary was funded by a Federal grant that precluded billing for most of his services." *Id.*

16. *Id.*

17. *Id.* "In late 2005, when referring to another doctor of Middle Eastern descent, [Dr.] Levine said in [Dr.] Nassar's presence, 'Middle Easterners are lazy.'" *Id.* Dr. Keiser also testified that "in reference to the hiring of that same doctor, [Dr.] Levine said they have 'hired another one' in [Dr.] Keiser's presence. [Dr.] Keiser interpreted this comment as indicating that [the Hospital] had hired another 'dark skin[ ] Muslim like Nassar,' and [Dr.] Keiser told [Dr.] Nassar what [Dr.] Levine had said." *Id.*

18. *Id.* at 451. Dr. Fitz served as Dr. Nassar's third-line supervisor. *See id.* (identifying Dr. Fitz as "[the University's] Chair of Internal Medicine and [Dr.] Levine's immediate superior").

19. *Id.* at 451.

Dr. Nassar was promoted to Associate Professor in March 2006, despite Dr. Levine's alleged attempts to undermine his promotion.[20] Dr. Nassar sought alternatives to working under Dr. Levine, such as resigning from the University while remaining a physician at the Hospital.[21] He met with Dr. Fitz to discuss such a plan, but Dr. Fitz opposed it based on a strict reading of the University and Hospital affiliation agreement, which Dr. Fitz claimed obligated the Hospital to fill positions with University faculty.[22] In contrast, the Hospital informed Dr. Nassar that the Hospital "would . . . hire him to work at the Amelia Clinic" exclusively, even if he resigned from the University.[23]

The Hospital extended Dr. Nassar a job offer on June 3, 2006, to begin the following month.[24] On July 3, 2006, Dr. Nassar resigned from the University, by letter to Dr. Fitz and other faculty, stating that Dr. Levine had harassed and discriminated against him.[25] Dr. Fitz opposed the Hospital's offer, which ultimately resulted in the Hospital's withdrawal of the offer of employment it had made to Dr. Nassar.[26]

Dr. Nassar filed suit in the United States District Court for the Northern District of Texas, alleging two Title VII violations:[27] (1) a status-based discrimination claim under Section 2000e–2(a);[28] and (2) a retaliation claim

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20. *See id*. (describing Dr. Levine's efforts to mislead Dr. Nassar in applying for the promotion). In one instance, "[Dr.] Levine told [Dr.] Nassar that he was unlikely to be promoted because Dr. Mumford did not like him. [Dr.] Nassar later found out that [Dr.] Mumford was not on the Promotions and Tenure Committee . . . nor did [Dr. Mumford] oppose [Dr.] Nassar being promoted." *Id.*

21. *Id.*

22. *Id*. "[Dr.] Nassar disputed [the University's] interpretation of the [affiliation] agreement and contended that some of the [Hospital] doctors he worked with at the Amelia Clinic were not [University] faculty." *Id*.

23. *Id*.

24. *Id*. As indicated in the offer, Dr. Nassar was to be on the Hospital's payroll, not on the University's. *Id*.

25. *Id*. Dr. Nassar's letter stated:

> The primary reason of my resignation is the continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine. . . . I have been threatened with denial of promotion, loss of salary support and potentially loss of my job . . . . [This treatment] stems from [Levine's] religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment.

Id.

26. *Id.* Conflicting evidence was presented to the jury as to why Dr. Fitz opposed the Hospital's offer. *Id*. Dr. Keiser, Dr. Nassar's first-line supervisor, testified that Dr. Fitz was "shocked" by the allegations Dr. Nassar made against Dr. Levine in his resignation letter and felt that he needed to publicly exonerate Dr. Levine by preventing Dr. Nassar from transferring to the Hospital. *Id*. "Whatever the terms of the affiliation agreement, [Dr.] Fitz's opposition prompted [the Hospital] to withdraw [its] offer . . . ." *Id*.

27. *Id.* at 452.

28. Dr. Nassar alleged that discrimination based on his race, national origin, and religion prompted University officials to constructively discharge him. Nassar v. Univ. of Tex. Sw. Med.

under Section 2000e–3(a).[29] Specifically, Dr. Nassar alleged racially and religiously motivated harassment resulting in his constructive discharge, and he alleged retaliation for complaining about Dr. Levine's harassment.[30] The jury found that Dr. Nassar was (1) constructively discharged from the University and (2) that the University retaliated against Dr. Nassar by preventing the Hospital from hiring him.[31] After the jury entered its verdict, "[the University] filed a renewed motion for judgment as a matter of law [and] a motion for new trial," but the district court denied both motions.[32]

The University appealed the district court's decision to the U.S. Court of Appeals for the Fifth Circuit, which reviewed *de novo* the denial of the University's motion for judgment as a matter of law.[33] The University claimed there was insufficient evidence to sustain the jury's verdict in favor of Dr. Nassar's claims.[34] The Fifth Circuit agreed with the University's position with regard to Dr. Nassar's status-based constructive discharge claim,[35] vacating that part of the district court's holding.[36] The Fifth Circuit, however, affirmed the district court's decision on Dr. Nassar's retaliation claim,[37] "find[ing] no basis to upset the jury's verdict that [the University] retaliated against [Dr.] Nassar because of his complaints of racial discrimination."[38] The Fifth Circuit suggested that the standard for establishing retaliation entailed a showing that retaliation was a motivating factor in the adverse employment decision.[39] The Fifth Circuit held that Dr. Nassar proffered sufficient evidence that retaliation, as punishment for com-

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Ctr., No. 3:08-CV-1337-B, 2010 WL 3000877, at *1 (N.D. Tex. July 27, 2010). The Equal Employment Opportunity Commission ("EEOC") defines constructive discharge as "forcing an employee to resign by making the work environment so intolerable a reasonable person would not be able to stay." PROHIBITED EMPLOYMENT POLICIES/PRACTICES (2013), http://www.eeoc.gov/laws/practices/#constructive_discharge (last visited May 5, 2014).

29. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524 (2013).

30. *Nassar*, 2010 WL 3000877, at *1. Both constructive discharge and retaliation are violations of Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e-2(a), 3(a) (2006 & Supp. 2012).

31. *Id.* Dr. Nassar was awarded "$438,167.66 in back pay and benefits, and $3,187,500.00 in compensatory damages." *Id*. The district court, however, reduced the award of compensatory damages to $300,000, in keeping with "Title VII's compensatory damages cap." *Nassar*, 674 F.3d at 452.

32. *Id.*

33. *Id.*

34. *Id.* at 453.

35. *Id*. at 454.

36. *Id*. at 456.

37. *Id*.

38. *Id*.

39. *See id*. ("Our review is instead 'to determine only whether the record contains sufficient evidence for a reasonable jury to have made its ultimate finding that [the employer's] stated reason for [taking adverse employment action against the employee] was pretext or that, while true, was only one reason for their being fired, and race was another motivating factor.'").

plaining about Dr. Levine, was a motivating factor in Dr. Fitz's interference with the Hospital's employment offer to Dr. Nassar.[40]

The University appealed, and the U.S. Supreme Court granted certiorari to decide the proper causation standard for Title VII retaliation claims.[41]

II. LEGAL BACKGROUND

Significant confusion exists regarding factual causation in employment discrimination law.[42] Title VII of the Civil Rights Act of 1964,[43] the primary federal legislation underlying employment discrimination law, does not specify a causation standard, that is, how a plaintiff may prove the factual link between an employer's discriminatory intent and the adverse employment action that befell the plaintiff.[44] Significant amendments to Title VII in the Civil Rights Act of 1991 further confused the courts because of their nebulous scope.[45] From the governing language of Title VII and closely related antidiscrimination legislation, courts have inferred varying and conflicting standards to direct causal inquiry in the seven different types of employment discrimination cases.[46] The *Nassar* Court relied on this lengthy history to articulate a causation standard to use in deciding Title VII retaliation claims.[47]

A. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 outlawed workplace discrimination based on race, color, religion, national origin, and sex.[48] The law also made it illegal to retaliate against an employee for reporting an incident of discrimination, for filing a charge of discrimination, or for participating in an employment discrimination investigation or lawsuit.[49] Of the seven criteria protected from discrimination by employees, five—race, color, reli-

40. *Id.* The jury placed decisive weight on Dr. Keiser's testimony that Dr. Fitz told him that he stifled Dr. Nassar's transfer because of the complaints Dr. Nassar made about Dr. Levine in his resignation letter. *See id.* (explaining that "[t]he jury considered both parties' evidence and resolved the conflict against [the University]").

41. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2523 (2013).

42. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180–81 (2009) (Stevens, J., dissenting) (disagreeing with the majority's decision in *Gross* to require a showing of "but for" causation in the Age Discrimination in Employment Act.).

43. 42 U.S.C. §§ 2000e–2000e-17 (2006 & Supp. 2012).

44. *Id.*

45. *See infra* Part II.D.

46. *See infra* Parts II.B–C, E.

47. *See infra* Part III.

48. 42 U.S.C. § 2000e-2(a). Generally, Title VII applies to employers with fifteen or more employees. *See* 42 U.S.C. § 2000e(b) (defining "[t]he term 'employer'" for purposes of Title VII).

49. 42 U.S.C. § 2000e-3(a).

gion, national origin, and sex—are outlined in Section 2000e–2(a);[50] discrimination based on these characteristics is referred to as status-based discrimination.[51] The two other criteria, contained in Section 2000e–3(a),[52] relate to employee conduct, specifically an employee's opposition to employment discrimination and an employee's support for a coworker's complaint alleging discrimination.[53] Both provisions are silent about the standard an employee must satisfy in order to prove he was subject to prohibited conduct, indicating no causation standard or the respective burdens of proof the parties must meet.[54]

B. Single Motive Discrimination: Proving Pretext Through the McDonnell Douglas *Burden-Shifting Framework*

The Supreme Court first discussed proof and causation under Title VII in *McDonnell Douglas Corp. v. Green*.[55] *McDonnell Douglas* set forth the framework through which employees could prove the existence of an employer's covert, impermissible motivation by proving the implausibility of alternative permissible motivations.[56] *McDonnell Douglas* is notable be-

50. 42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

51. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006).

52. 42 U.S.C. § 2000e-3(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

53. *Id.*; *Burlington*, 548 U.S. at 63.

54. *See* 42 U.S.C. §§ 2000e-2(a), 3(a) (lacking any indication of the standard an employee must satisfy in order to prove a claim of employment discrimination under Title VII of the Civil Rights Act of 1964).

55. 411 U.S. 792 (1973). In *McDonnell Douglas*, the employee alleged that he was denied employment "because of his race and persistent involvement in the civil rights movement," while the employer asserted that the employee was discharged because of his participation in unlawful activity. *Id*. at 796.

56. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–55 & n.7 (1981) (describing the framework set forth by the Supreme Court in *McDonnell Douglas* and explaining the plaintiff's burden of "establishing a prima facie case of disparate treatment"). The *McDonnell Douglas* Court recognized that the problem space was framed by opposing contentions and outlined a scheme of shifting burdens and proofs for determining the legitimacy of a plaintiff's claim and the veracity of an employer's proffered motive. *McDonnell Douglas*, 411 U.S. at 802–06.

cause the Court interpreted the language in Title VII as reducing the burden of proof an employee must carry to prove discrimination under Title VII.[57]

The *McDonnell Douglas* Court provided employees an opportunity to challenge an employer's proffered nondiscriminatory reason for taking certain employment actions as pretextual, rather than requiring employees to make an initial showing of but-for causation.[58] In effect, instead of requiring the employee to prove that his employer took a negative employment action because of race, the Court instructed the employee to offer evidence that would cast doubt upon the employer's purportedly legitimate reasons for taking the action at issue.[59] To assist the employee in doing so, the Court articulated a burden-shifting framework to prove pretext: once an employee proves a prima facie case of discrimination, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory" reason for the adverse employment action.[60] If the employer proffers such a reason, the burden returns to the employee to prove the employer's stated reason is not worthy of credence and, thus, is a pretext for an impermissible motive.[61]

In so ruling, the Court created a proof scheme through which employees could compel an employer to proffer legitimate reasons for contested actions and could prove pretext.[62] This framework, informed by the Court's experience that plaintiffs in employment discrimination cases are often disadvantaged, creates a presumption against the employer, who is believed to have acted with an impermissible motive unless the employer explain otherwise.[63] Thus, *McDonnell Douglas* advanced a lowered causation regime

57. *See Burdine*, 450 U.S. at 253 ("The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.").

58. *See McDonnell Douglas*, 411 U.S. at 802 ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination.").

59. *Id.* at 802–06.

60. *Id.* at 802. At all times the burden of persuasion remains with the employee. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). The employer's burden is characterized as a burden of production, and once it satisfies its burden, the inference of discrimination established by the prima face case drops from the inquiry. *Id.* at 506–07.

61. *See McDonnell Douglas*, 411 U.S. at 805 ("[R]espondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.").

62. *See id*. at 802–05 (setting forth the framework for employment discrimination actions under Title VII).

63. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the

through its burden-shifting framework when it lessened the employee's burden of proof by forcing the employer to justify its actions.[64]

C. Mixed Motive Discrimination: Price Waterhouse *Defines Title VII's "Because of" Language*

In its 1989 plurality decision in *Price Waterhouse v. Hopkins*,[65] the Supreme Court defined the causation standard underlying Section 2000e-2 of Title VII, which governs the five status-based criteria: race, color, religion, national origin, and sex.[66] The Court interpreted the words "because of" in the text of Section 2000e-2 to embody a motivating factor causation standard, reasoning that to interpret the words "because of" as requiring the most demanding test of causation—but-for—is to "misunderstand them."[67] *Price Waterhouse* controls in mixed-motive cases, where the evidence demonstrates that both pretextual (unlawful) and non-pretextual (lawful) motivations played a role in the contested employment action.[68]

Price Waterhouse responded to the lower court split over the burdens, allocations, and types of proof to be shown in mixed-motive Title VII claims.[69] Though some federal courts of appeals analyzed whether the employer placed decisive consideration on an impermissible motive,[70] the *Price Waterhouse* Court rejected such a demanding causation standard;[71] it promulgated an inquiry that asked if an employer allowed a protected attribute to play a part in the employer's decision.[72]

Under the *Price Waterhouse* framework, an employee must prove that an employer's impermissible consideration was a motivating factor in the adverse employment action in order to sustain a finding of liability under Section 2000e-2, thus preserving employee interests.[73] Nevertheless, the framework was devised to enable an employer to escape liability by proving a same-action defense—that it would have taken the contested action in the

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employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." (citation omitted)).

64. *See McDonnell Douglas*, 411 U.S. at 802–05 (describing the burden shifting framework for determining employment discrimination actions brought under Title VII of the Civil Rights Act of 1964).

65. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* Burrage v. U.S., 134 S. Ct. 881 (2014).

66. 42 U.S.C. §2000e-2(a)(1) (2006 & Supp 2012); *Price Waterhouse*, 490 U.S. at 240–42.

67. *Price Waterhouse*, 490 U.S. at 240 & n.6 (internal quotation marks omitted).

68. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 171 (2009).

69. *Price Waterhouse*, 490 U.S. at 238 n.2.

70. *See id*. (describing the various causation standards employed by the lower courts in determining employment actions under Title VII prior to the Court's decision in *Price Waterhouse*).

71. *Id.* at 240–42.

72. *Id*. at 240–41.

73. *Id*. at 244–45.

absence of that illegal consideration, thereby balancing employer interests.[74] This motivating factor test relies on a modified burden-shifting regime, as articulated in *McDonnell Douglas*, and thus advances a less-burdensome causation standard for employees.[75]

In her concurrence, Justice O'Connor advanced a similar test that required an employee to demonstrate that a discriminatory motive was a "*substantial* factor" in the contested decision.[76] Justice O'Connor suggested that the *Price Waterhouse* framework govern when the employee proffers direct evidence of discrimination, and that the *McDonnell Douglas* framework apply when a plaintiff presents circumstantial evidence.[77]

Writing for the dissent, Justice Kennedy demanded a stronger causal link, believing that claims under Section 2000e-2 must be proved according to but-for causation, that is, the impermissible consideration must be a necessary cause of the employment action.[78]

D. Codification of Burden-Shifting: The 1991 Civil Rights Act and Title VII Amendments

Congress enacted the Civil Rights Act of 1991 (the "Act")[79] in response to Supreme Court decisions that had undermined the protections in Title VII.[80] The Act amended statutes enforced by the Equal Employment Opportunity Commission ("EEOC"), codifying certain Court precedent, while superseding other precedent.[81] Notably, in response to *Price Waterhouse*, the Act codified the "motivating factor" standard of causation under Section 2000e-2(a),[82] by adding Section 2000e-2(m),[83] and it superseded

74. *Id.* The same action defense is no longer available to employers. *See infra* Part II.D.

75. *See Price Waterhouse*, 490 U.S. at 252–53 (stating that employers need only satisfy a preponderance of the evidence standard in proving their claims, not a clear and convincing evidence standard as required by some of the lower courts).

76. *Id.* at 265 (O'Connor, J., concurring).

77. *Id.* at 278–79.

78. *Id.* at 281–86 (Kennedy, J., dissenting).

79. 42 U.S.C. § 1981 (2006).

80. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 185 (2009) (Stevens, J., dissenting); *The Civil Rights Act of 1991*, EQUAL EMPLOYMENT OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html (last visited May 5, 2014) .

81. *The Civil Rights Act of 1991*, *supra* note 80.

82. *Id.*

83. *See* 42 U.S.C. § 2000e-2(m) (2006 & Supp. 2012) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

the "same action" affirmative defense afforded to employers, by preventing employers from escaping liability in Section 2000e-5(g)(2)(B).[84]

E. Gross v. FBL Financial Services*: A New Definition for "Because of" in Title VII Actions*

Twenty years after the *Price Waterhouse* Court interpreted the words "because of" in Section 2000e-2(a) to establish a lowered causation standard,[85] in *Gross v. FBL Financial Services, Inc.*,[86] the Court applied a different definition to those same words in the Age Discrimination in Employment Act of 1967 ("ADEA"),[87] requiring but-for causation to prove age discrimination claims under the ADEA.[88]

The Court rejected the argument that a "motivating factor" causation standard applied under the ADEA because of the textual and structural similarities between the ADEA and Title VII.[89] The Court placed decisive weight on Congress's 1991 amendments to Title VII, which added Section 2000e-2(m) to require "motivating factor" causation under Section 2000e-2, but found no such intent to indicate a similar causal framework in the ADEA.[90] Therefore, the Court interpreted the plain meaning of "because of"[91] in the ADEA as synonymous with "by reason of" or "on account of," meaning that it is outcome determinative.[92] The Court reasoned that "because of" in the ADEA required an employee to show that the discriminatory reason was the "but-for" cause—that is, the necessary cause—of the adverse action.[93] In so ruling, the *Gross* Court broke from the *McDonnell*

84. *Gross*, 557 U.S. at 185 (Stevens, J., dissenting); *see also* 42 U.S.C. § 2000e-5(g)(2)(B) (2006) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).").

85. *See supra* text accompanying notes 65–75.

86. 557 U.S. 167 (2009). In *Gross*, the petitioner alleged that his employer demoted him in violation of "the [ADEA], which makes it unlawful for an employer to take adverse action against an employee 'because of such individual's age.'" *Id*. at 170 (quoting 29 U.S.C. § 623(a) (2006)).

87. Age Discrimination in Employment Act, 29 U.S.C. § 621–34 (1967).

88. *Gross*, 557 U.S. at 177.

89. Id. at 173–75. The ADEA's text reads almost identically to that of Title VII: specifically, it states that it is unlawful for an employer to take adverse action against an employee "because of such individual's age." 29 U.S.C. § 623(a).

90. *Gross*, 557 U.S. at 173–75.

91. 29 U.S.C. § 623(a)(1).

92. *Gross*, 557 U.S. at 176.

93. *Id.*

Douglas and *Price Waterhouse* interpretations and embraced new readings of causation to govern claims of workplace age discrimination.[94]

III. THE COURT'S REASONING

In *University of Texas Southwestern Medical Center v. Nassar*, the United States Supreme Court held that retaliation claims raised under Section 2000e–3(a) of Title VII of the Civil Rights Act of 1964 "must be proved according to traditional principles of but-for causation."[95] In so ruling, the Court reversed the holding of the Fifth Circuit Court of Appeals—which had sustained a retaliation claim under the lessened "motivating factor" causation test codified in Section 2000e-2(m)—and remanded the case for processing consistent with the Court's clarified causation standard.[96] Effectively, retaliation claims must now be supported by proof that the adverse action "would not have occurred in the absence of the" employer's retaliatory motive.[97]

The issue before the Court was whether retaliation claims under Section 2000e-3(a) must be proved according to the "motivating factor" standard of Section 2000e–2(m) or whether but-for causation must be established.[98] In order to answer the issue before it, the Court first reviewed the default legal causation standards that Congress would have accepted in enacting Title VII "absent an indication to the contrary."[99] The Court then investigated its own and Congress's interpretations of causation in regard to federal statutory claims of workplace discrimination and retaliation.[100]

At the outset of its opinion, Justice Kennedy, writing for the majority, explained that it conceived of employment disputes as analogous to tort claims, and accordingly, tort law conceptions of causation were applicable.[101] As such, in determining responsibility and compensation for an injury sustained as the result of prohibited conduct, the employee must establish a connection between the prohibited conduct and the injury sustained.[102] Here, the Court believed it must determine the kind of connection—that is, the type of causation—that must be established to prove such a relationship existed in the context of Title VII.[103]

94. *See infra* Part II.
95. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013).
96. *Id.* at 2534. Justice Kennedy delivered the opinion of the Court.
97. *Id.* at 2533.
98. *Id.* at 2522–23.
99. *Id.* at 2524–25.
100. *Id.* at 2525–28.
101. *Id.* at 2524–25.
102. *Id.* at 2525.
103. *Id.* at 2524.

Next, the Court distinguished Title VII's protections against status-based discrimination (Section 2000e-2(a)) from those against retaliation (Section 2000e-3(a)), believing that the causation standard governing status-based claims was settled by *Price Waterhouse* and the subsequent 1991 Amendments (specifically, Section 2000e-2(m)), whereas the standard governing conduct-based discrimination was not settled.[104] Absent an indication to the contrary, the Court reasoned the causation standard for retaliation claims must be gleaned from the "background against which Congress legislated in enacting Title VII."[105] That background, the Court explained, was one of tort law, which necessitated a finding of cause-in-fact.[106] The Court reasoned that in the absence of a specific prescription to deviate from this understanding, the words "because of" require proof of but-for causation.[107]

The Court also explained that the "motivating factor" test and the *Price Waterhouse* mixed-motive analysis were inapplicable under Section 2000e-3 because the structure of Title VII was dispositive.[108] Specifically, the Court believed that the placement of Section 2000e-2(m) in the status-based subsection (Section 2000e-2) and not in the retaliation subsection (Section 2000e-3) indicated Congress's intent to extend a reduced causation regime only to status-based discrimination.[109]

In addition, the Court looked to the ruling in *Gross v. FBL Financial Services, Inc.*, a case involving similar "because of" language in the ADEA, to show that the *Price Waterhouse* mixed-motive analysis was not designed to apply to the entirety of Title VII.[110] According to the Court, because there was little textual difference between the retaliation section of Section 2000e–3(a) of Title VII and the provision in the ADEA implicated in *Gross*, the two should be interpreted similarly.[111]

The Majority concluded with a policy argument in favor of a heightened causation standard.[112] It pointedly stated that the number of retaliation

104. *Id.* at 2528–30.

105. *Id.* at 2525.

106. *Id.* at 2524–25. The Majority drew on passages from classic tort law scholarship to frame its understanding of the but-for test, quoting passages on negligence, intentional infliction of bodily harm, and intentional torts, in order to frame the problem space before it. *Id.* Then, satisfied that it accurately described the "background against which Congress legislated in enacting Title VII"—that is, the implicit understanding of causation Congress purportedly incorporated into Title VII—the Court appropriated wholesale the rigid but-for test as governing claims under § 2000e-3(a). *Id*. at 2524–25, 2533.

107. *Id.* at 2532–33.

108. *Id.* at 2528–31.

109. *Id.* at 2529.

110. *Id*. at 2527–28, 2534.

111. *Id*. at 2528.

112. *Id*. at 2531–32.

actions doubled in a fifteen-year span, and a heightened standard served to reduce the number of frivolous claims while preserving resources.[113]

In dissent, Justice Ginsburg advocated in favor of the "motivating factor" causation standard.[114] She cited the extensive precedent both from the Court and the EEOC that treated status-based discrimination and retaliation claims as interrelated.[115] Justice Ginsburg argued that no actual evidence existed to show that Congress intended to maintain a heightened causation standard for retaliation, but reduced the causation standard for status-based discrimination in its Section 2000e–2(m) amendment.[116] Lastly, Justice Ginsburg was critical of the but-for test, citing the difficulties in implementing such a practice, as employment cases often deal with nebulous and intangible factors that frequently cannot be proved under a but-for standard.[117]

IV. ANALYSIS

The but-for causation test adopted by the *Nassar* majority to control in retaliation claims under Section 2000e–3(a) is unworkable in employment discrimination law.[118] This test, rooted in tort law understandings of cause and effect,[119] does not seek to uncover hidden motives (as would burden-shifting),[120] expose false reasons (as does pretext analysis),[121] or take into account the multiple factors that may play a role in an employment action.[122] Instead, it demands that an employee prove retaliation was a cause-

113. *Id.*

114. *See id.* at 2535 (Ginsburg, J., dissenting) ("In so reining in retaliation claims, the Court misapprehends what our decisions teach: Retaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it.").

115. *Id.* at 2535, 2537–38, 2540.

116. *Id.* at 2539–40.

117. *Id.* at 2547.

118. *See infra* Part IV.A.

119. *Nassar*, 133 S. Ct. at 2524–25; *see also* Gross v. FBL Fin. Servs., Inc., 577 U.S. 167, 176, 190 (2009) ("In [the tort] context, reasonably objective scientific or commonsense theories of physical causation make the concept of 'but for' causation comparatively easy to understand and relatively easy to apply.").

120. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (reasoning that legitimate as well as illegitimate motives inform the decision in mixed-motives cases and that an employer should not escape liability by offering a reason for its actions when that reason was not the true motivating reason), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* Burrage v. U.S., 134 S. Ct. 881 (2014).

121. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (stating that a crucial part of the inquiry demands that the employee be afforded a fair chance to rebut the employer's purported nondiscriminatory reason as pretext).

122. *See Price Waterhouse*, 490 U.S. at 241 (acknowledging that there are often many considerations at play when an employment decision is made); *see also* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("[T]he question facing triers of fact in discrimination

in-fact (that is, necessary cause) of the adverse employment action, a near-impossible burden in employment discrimination law.[123]

The *Nassar* Court erred when it adopted a but-for causation test to govern claims under Section 2000e–3(a) because: (1) the tort law test of but-for causation is unworkable in employment discrimination law;[124] (2) the but-for test functions ostensibly to foreclose successful retaliation claims;[125] and (3) the Court disregarded the significance of past jurisprudence and mischaracterized the purpose and intent of the 1991 Civil Rights Act and its amendments, which all indicate that employees are to be afforded greater protection from retaliation than the *Nassar* formulation furnishes.[126]

A. The Tort Law Test of But-For Causation Is Impracticable in Employment Discrimination Law

The common law history and underpinnings of tort law differ from the legislative history and intent of Title VII's discrimination and retaliation protections, as employment discrimination law is not founded on the common law.[127] Rather, employment discrimination law finds its genesis in federal statutory legislation.[128] The *Nassar* majority erroneously conceives of the search for motive under Section 2000e–3(a) as an inquiry that demands a showing of but-for causation to prove a cause-in-fact.[129] This mischaracterizes the sort of inquiry that should be conducted in employment discrimination law, which is a search for an impermissible motive as well as

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cases is both sensitive and difficult. . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

123. *See infra* Part IV.B; *see also Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting) ("[A] strict but-for test is particularly ill suited to employment discrimination cases."); *Gross*, 557 U.S. at 190–91 (2009) (Breyer, J., dissenting) ("It is one thing to require a typical tort plaintiff to show 'but-for' causation. . . . But it is an entirely different matter to determine a 'but-for' relation when we consider, not physical forces, but the mind-related characterizations that constitute motive."); *Price Waterhouse*, 490 U.S. at 247 ("Where a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was *the* 'true reason' for the decision . . . ." (quoting Brief for Petitioner at 20)).

124. *See infra* Part IV.A.

125. *See infra* Part IV.B.

126. *See infra* Part IV.C.

127. Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc.*, and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 83–84 & n.60 (2010).

128. *See* Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1255 n.86 (1988) ("Major efforts to eliminate discrimination in employment did not begin until after the enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17.").

129. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013).

a factual link between the motive and the injury sustained.[130] Ascertaining a cause-in-fact link should not be the standard to prove impermissible motive in employment discrimination law.[131]

In tort law, causal analysis plays a central role in determining both responsibility (moral blame) and liability (legal blame).[132] Causation as a means of proving both a factual link and liability found its genesis in the tort of negligence.[133] Negligence law differed from other forms of tort liability in that a negligent party's liability was not as obvious as that of an intentional tortfeasor or a party whose responsibilities were assigned in a written expression of intent.[134] Negligent tortfeasors were often engaged in "socially useful" activities at the time some harm resulted from their carelessness.[135] In these situations, moral blame or pre-apportioned responsibility was absent; instead, issues of fairness and social utility clouded and mitigated attribution of liability.[136]

As a result of negligence law, the concept of causation came to embody both the factual link and an implicit judgment of responsibility: the former inquiry is now called cause-in-fact, while the latter is termed proximate cause.[137] Cause-in-fact is determined by the single inquiry of the but-for test, whereas proximate cause investigation is a multi-faceted inquiry that looks to the legal cause and other considerations.[138] Proximate cause findings incorporate evaluation of policy judgments, burdens of proof, and other related considerations, thus expanding or limiting liability for injuries found under a cause-in-fact inquiry.[139] These are two distinct inquiries.

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130. Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 503–04 (2001).

131. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (stating that not all common law principles are transferrable in all of their particulars to Title VII); *see also* Harper, *supra* note 127, at 84 ("Determining the meaning of the ambiguous 'because of' phrase in § 703(a)(1) cannot rely on common law precedents any more than it can rely on an interpretation of 'everyday speech'; it requires an analysis of this public purpose and the difficulty of proof of discriminatory motivation.").

132. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 92–93 (expanded ed. 2003).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 93.

138. Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 957–58 (2001); *see also* WHITE, *supra* note 132, at 93.

139. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §42, at 273 (5th ed. 1984) (stating that an inquiry into proximate cause is a question about "whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred").

Adoption of the but-for test evinces the *Nassar* Court's failure to distinguish the demonstrable factual link from the normative extent of legal responsibility. Title VII is a statutory scheme that creates normative expectations of employer and employee relationships and demands consideration of multiple inquiries.[140] To search only for the cause-in-fact of an employer's action underestimates the scope of the inquiry demanded under Title VII.[141] But-for causation alone cannot underlie Title VII's proof schemes—the search for motive is also an inquiry into proximate cause.[142]

Finding a cause-in-fact through the but-for test is appropriate in many instances in tort law because torts commonly involve physical forces and tangible actions that cause demonstrable harm.[143] Where, however, employees are facing discrimination and retaliation they are harmed by intangible thoughts and considerations, pretextual reasons, and other factors that may inform an adverse decision.[144] As Justice Breyer noted in his dissent in *Gross*, in tort law, "scientific or commonsense theories of physical causation make the concept of 'but-for' causation comparatively easy to understand and relatively easy to apply;"[145] however, drawing a distinction between physical causation and causation in employment discrimination claims, he cautioned that "it is an entirely different matter to determine a 'but-for' relation when we consider, not physical forces, but the mind-related characterizations that constitute motive."[146] But-for analysis asks the employee to prove the unknowable and only asks for a partial inquiry into the entire controversy.[147] As a result, the single-tiered inquiry of but-

140. *See id*.

141. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241–42 (1989) ("It is difficult for us to imagine that, in the simple words 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon [impermissible] considerations in coming to its decision."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* Burrage v. U.S., 134 S. Ct. 881 (2014).

142. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 190–91 (2009) (Breyer, J., dissenting) (describing the challenge that the inquiry into "motive" presents with regard to determining causation).

143. *Id.* at 190.

144. *See id.* at 191 (illustrating the challenge that but-for causation presents in the context of employment discrimination).

145. *Id.* at 190.

146. *Id.*

147. *See id*. at 190–91 (noting that the single inquiry of the but-for test, which asks what would have happened in the alternative, ignores the mixed motives that form employment decisions and asks a question with an unknowable answer).

for causation is insensitive to the realities of proving motive in employment discrimination law.[148]

B. The But-For Test Functions to Foreclose Successful Retaliation Claims

Rigid but-for causal analysis to determine a cause-in-fact law prejudices employees.[149] Application of the but-for test forces courts to speculate about the employer's motivations at the time of the employment decision, an "unknowable state of affairs."[150] Even worse, it provides no remedy to employees who cannot prove that retaliation was the sole cause of the adverse action that befell them, nor does it ascribe liability to an employer who was partially motivated by discriminatory motives.[151] Importantly, the but-for test forces employees "to identify the precise causal role played by legitimate and illegitimate motivations" in contested employment actions.[152] Just as status-based discrimination is subject to the burden-shifting framework containing the lowered causation regime, so too should retalia-

148. *See id*. at 191 (explaining that where multiple motives influence an adverse employment action, "the employee likely knows less than does the employer about what the employer was thinking at the time, [and] the employer will often be in a stronger position than the employee to provide the answer"); *see also* Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 66–67 (1956) ("The but-for rule is hardly an adequate substitute for this homely blend of fact and policy that is so deep rooted in our approach to everyday problems. It marks an attempt to poise the inquiry on a wholly abstract plane, stripped of all evaluative overtones. The essential weakness of the but-for test is the fact that it ignores the irresistible urge of the trier to pass judgment at the same time that he observes. It is an intellectual strait jacket to which the human mind will not willingly submit. The test was discredited even for philosophical usage by David Hume, its originator. It has been rejected by courts for many types of controversies because, as we shall see, it has often failed to afford even an approximate expression of the minimal requirement for imposing legal liability.").

149. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2547 (Ginsburg, J., dissenting) ("As the plurality and concurring opinions in *Price Waterhouse* indicate, a strict but-for test is particularly ill suited to employment discrimination cases."); *see also* Andrew Kenny, *The Meaning of "Because" in Employment Discrimination Law: Causation in Title VII Retaliation Cases After* Gross, 78 U. CHI. L. REV. 1031, 1032 (2011) (characterizing the but-for test as "pro-employer standard").

150. *Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting) (quoting Malone, *supra* note 148, at 67); *see also Gross*, 557 U.S. at 191 (Breyer, J., dissenting) ("In a case where we characterize an employer's actions as having been taken out of multiple motives . . . to apply 'but-for' causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different.").

151. As Senator Clifford P. Case, one of the sponsors of Title VII, said, the "'sole cause' standard" renders Title VII protections "'totally nugatory.'" *Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting).

152. Price Waterhouse v. Hopkins, 490 U.S. 228, 241–42 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* Burrage v. U.S., 134 S. Ct. 881 (2014).

tion based conduct, which similarly operates in the shadows and behind closed doors and is not the result of one cause.[153]

1. The Hypothetical Alternative Demanded by the But-For Test Compromises an Employee's Ability to Prove Retaliation

The hypothetical alternative underlying the but-for test cripples an employee's ability to prove retaliation.[154] The but-for test is framed around the hypothetical alternative in that the test seeks an inverse: A fact-finder asks, "Would the plaintiff have been injured in the same way even if the defendant had not been negligent?"[155] Applying the but-for causation test to employment disputes asks courts to hypothetically determine what would have happened in the absence of the employer's purportedly illegal action,[156] that is, to imagine a scenario in which the employer acted lawfully. This determination demands more than a showing that the effect still would have occurred; it requires that a particular motivation be identified as the reason for the employer's action.[157] As a result, the hypothetical alternative makes the but-for test unworkable in proving retaliation because it demands proof of what often cannot be proved.

In her *Price Waterhouse* concurrence, Justice O'Connor prophetically captured the difficulty an employee alleging retaliation encounters in trying to prove his claim:

> Particularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions.[158]

This contrary-to-the-fact analysis disadvantages the employee because he does not, and likely cannot, know the considerations and motivations of the employer and identify a specific one as determinative.[159]

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153. *Id.*

154. *See* KEATON ET AL., *supra* note 139, § 41, at 265 ("[T]he classic test for determining cause in 'fact' directs the 'factfinder' to compare what did occur with what would have occurred if hypothetical, contrary-to-fact conditions had existed.").

155. *Id.* at 265–66.

156. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 191 (2009) (Breyer, J., dissenting) ("In a case where we characterize an employer's actions as having been taken out of multiple motives . . . to apply 'but-for' causation is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different.").

157. *Id.*

158. *Price Waterhouse*, 490 U.S. at 273 (O'Connor, J., concurring).

159. *Gross*, 557 U.S. at 191.

In employment law, discrimination may operate subtly and unconsciously, without obvious intentionality.[160] Additionally, often employers and decisionmakers are unaware of what causes them to act.[161] To force an employee and a factfinder to ascertain an employer's thoughts and motivations demands great leaps of imagination, guesswork, and basically telepathy from both the employee and the court. The Court devised the burden-shifting framework in *McDonnell Douglas* to address this very obstacle: to assist plaintiffs with the difficult task of proving covert discrimination.[162]

A lowered causation standard accompanied by the burden-shifting framework forces employers to offer purportedly legitimate reasons why they took the contested action and then provides employees with an opportunity to challenge the proffered reasons.[163] It demands that employers present all of their defenses and gives an employee the chance to rebut each one; for this reason, the burden-shifting framework has been characterized as "pro-employee."[164] Conversely, but-for causation, with its single inquiry, renders an employee impotent by placing the onus on the employee to prove that retaliation was the necessary cause of the adverse action without providing the employee with the tools to probe into the mind of an employer and establish a hypothetical alternative.[165]

The hypothetical alternative in the but-for test ignores the reality of the evidentiary difficulties presented in employment discrimination claims.[166]

160. *See* White & Krieger, *supra* note 130, at 508 (explaining that there is "a clear and longstanding judicial recognition that age discrimination can result from the operation of subtle, unconscious mental processes" in ADEA cases).

161. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1185 (1995) ("The final [erroneous] assumption underlying disparate treatment analysis is the most obvious and, perhaps for that reason, the easiest to miss. Not only disparate treatment analysis, but the entire normative structure of Title VII's injunction 'not to discriminate,' rests on the assumption that decisionmakers possess 'transparency of mind'—that they are aware of the reasons why they are about to make, or have made, a particular employment decision. Possessed of such knowledge, well-intentioned decisionmakers are able to comply with Title VII's injunction 'not to discriminate.' Ill-intended decisionmakers know when they are taking an employee's group status into account; when challenged, they design 'pretexts' to cover their tracks.").

162. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

163. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

164. Kenny, *supra* note 149, at 1032.

165. Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* Burrage v. U.S., 134 S. Ct. 881 (2014); *see also* Harper, *supra* note 127, at 73 (describing the "motivating factor" legal standard as a legal doctrine designed to assist plaintiffs).

166. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 264 ("While requiring that the plaintiff in a tort suit or a Title VII action prove that the defendant's 'breach of duty' was the 'but-for' cause of an injury does not generally hamper effective enforcement of the policies behind those causes of action, 'at other times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have

Similar to the concern Justice O'Connor raised in her *Price Waterhouse* concurrence, Justice Breyer condemned the but-for regime in his dissent in *Gross* because it requires employees to prove that which is "far from obvious."[167] Such an inquiry undermines an employee's ability to mount a case in support of a retaliation claim.[168] The elements of proof the employee must proffer are under the control of the employer, and the cause-in-fact standard provides no means for an employee to obtain such proof.[169] The but-for test cannot dislodge such proof, but a lowered causation test applied with burden-shifting allows an employee to ascertain employer motives. Thus, it is better suited for employment discrimination claims.

2. Overdetermined Causation Frees Employers from Liability When an Employment Decision Is Based on More Than One Factor

But-for causation also fails to ascribe liability in an accurate manner and does not account for the many factors that inform employment actions.[170] Rarely is discrimination or retaliation the sole motive behind an employment decision;[171] however, the but-for test makes no provision for such an occurrence. The but-for test prevents a finding of overdetermined causation: when two or more factors are sufficient to produce a harm, but neither is a necessary condition, neither factor is the cause-in-fact.[172] Causally overdetermined events have no cause as the but-for test permits only one cause. Because it forbids overdetermined causation, the but-for test is also considered to be an exclusionary rule.[173] By appropriating the but-for

happened opens the door wide for conjecture. But when conjecture is demanded it can be given a direction that is consistent with the policy considerations that underlie the controversy.'" (quoting Malone, *supra* note 148, at 67)); *see also infra* Part IV.B.

167. *See* Gross v. FBL Fin. Serv., Inc., 577 U.S. 167, 190–91 (Breyer, J., dissenting) ("The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.").

168. *Nassar*, 133 S. Ct. 2517 at 2547 (Ginsburg, J., dissenting); *Price Waterhouse*, 490 U.S. at 264 (O'Connor, J., concurring).

169. *Nassar*, 133 S. Ct. at 2547.

170. *Gross*, 557 U.S. at 190–91 (Stevens, J., dissenting).

171. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.").

172. *See* KEATON ET AL., *supra* note 139, §41, at 266 ("[T]here is one type of situation in which [the but-for rule] fails. If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed.").

173. *Id.*

test, the *Nassar* majority assumes that there is only one motive behind a retaliatory employment action.[174]

As explained in Dobbs' *Law of Torts*,[175] the but-for test is unavailing in cases of overdetermined causation.[176] Dobbs uses an example in which two independent arsonists set fires that merge and incinerate a neighbor's property; although each fire by itself would have burned the property, under a literal reading of the but-for test, neither arsonist is liable.[177] In this overdetermined case, the property would have burned despite the addition of a second arsonist, and because either arsonist would have been sufficient to produce the injury neither arsonist *caused* the destruction.[178] The but-for test fails here, as it also fails in cases of employment discrimination, where causation is often overdetermined.[179]

Overdetermined causation demands that retaliation be proved to be the sole condition in the adverse employment action.[180] It is easy to imagine a situation in which both retaliatory and legitimate motivations take the place of the arsonists in the above analogy. Rarely, if ever, will someone's termination letter state: "Company XYZ decided to terminate your employment because you raised a claim of discrimination." Just as unlikely is an email that reads: "Management decided against your promotion because you provided testimony in support of your coworker's claim of discrimination." The company will likely proffer another reason that is valid on its face; however, this exclusionary rule prohibits an employee from proving that both the permissible and impermissible reason factored into the adverse action because the action would therefore be causally overdetermined. That employee's retaliation claim will fail even if the employee proffers proof that a retaliatory motive played a role, so long as the employee cannot prove that retaliation was the sole condition.

The *Price Waterhouse* plurality recognized the insufficiency of this rule in proving status-based discrimination, stating that overdetermined causation runs counter to common sense.[181] In an employment setting,

174. *Nassar*, 133 S. Ct. at 2533 (majority opinion).

175. DAN B. DOBBS, THE LAW OF TORTS (2000).

176. *See id.* §171, at 414–15 ("When each of two or more causes would be sufficient, standing alone, to cause the plaintiff's harm, a literal and simple version of the but-for test holds that neither defendant's act is a cause of the harm.").

177. *Id.*

178. *Id.*

179. *See Nassar*, 133 S. Ct. at 2547 (Ginsburg, J., dissenting) ("[A] strict but-for test is particularly ill suited to employment cases.").

180. *Id.* at 2533 (majority opinion) ("[But-for] requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.").

181. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) ("Events that are causally overdetermined, in other words, may not have any 'cause' at all. This cannot be so. We need not

wherein both illegal and legal motivations are sufficient to bring about an adverse action, the but-for test's single-tiered analysis takes no account of the sufficiency of all causes;[182] instead, the *Nassar* Court's formulation impossibly asks the employee to prove that retaliation was the necessary and sole cause.

C. The Court Mischaracterized the Purpose and Intent of the 1991 Civil Rights Act's Amendments and Disregarded the Significance of Past Jurisprudence

The *Nassar* Court erroneously appropriated a rigid tort law causation standard for retaliation claims by placing decisive weight on an unsound interpretation of the 1991 amendments and by mischaracterizing past jurisprudence.[183] In fact, past precedent and the legislative history of Title VII both indicate that employees are to be extended greater protections from retaliation than the *Nassar* formulation affords.[184]

1. The Legislative History of the 1991 Civil Rights Act Demonstrates That Employees Must Be Extended More Protection from Retaliation Than the But-For Causation Standard Affords

The *Nassar* majority incorrectly placed decisive weight on Congress's adoption of the 1991 Civil Rights Act to substantiate its conclusion that only status-based discrimination deserved a lowered causation regime.[185] Specifically, it mischaracterized congressional intent in adding Section 2000e–2(m) to Section 2000e–2, describing it as indicative of Congress's intent to weaken Title VII when, in fact, it was meant to strengthen and "restore"[186] the protections against discrimination.[187] Importantly, "[a] pur-

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leave our common sense at the doorstep when we interpret a statute."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* Burrage v. U.S., 134 S. Ct. 881 (2014). As the *Price Waterhouse* court acknowledged, "because of" does not denote "solely because of": it encompassed "those decisions based on a mixture of legitimate and illegitimate considerations." *Id.*

182. *See id*. (asking whether an employer considers an impermissible factor along with a legitimate one).

183. *See infra* Parts IV.C.1–2.

184. *See infra* Parts IV.C.1–2.

185. *See Nassar*, 133 S. Ct. at 2535 (Ginsburg, J., dissenting) ("Of graver concern, the Court has seized on a provision, § 2000e-2(m), adopted by Congress as part of an endeavor to strengthen Title VII, and turned it into a measure reducing the force of the ban on retaliation.").

186. *See id*. at 2539 (quoting H.R. REP. NO. 102-40, pt. 2, at 18 (1991)) ("Critically, the rule Congress intended to 'restore' was not limited to substantive discrimination."); *see also* Kenny, *supra* note 149, at 1036 n.31 (citing both the Civil Rights Act of 1991 and *Beckham v. National Railroad Passenger Corp.*, 736 F. Supp 2d 130, 142 (DDC 2010), to argue that "*Price Water-*

pose[] of [the Civil Rights Act of 1991] [was] to . . . strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination."[188]

As Justice Ginsburg wrote in her *Nassar* dissent: "The amendments were intended to provide 'additional protections against unlawful discrimination in employment,' . . . and to 'respon[d] to a number of . . . decisions by [this Court] that sharply cut back on the scope and effectiveness' of anti-discrimination laws . . . ."[189] Specifically, Congress disagreed with part of the Court's holding in *Price Waterhouse* enabling an employer to discharge his liability if he could prove that the same action would have been taken in the absence of a discriminatory motive.[190] Thus, in passing the 1991 Civil Rights Amendments, Congress signaled its intent to introduce a lowered causation standard governing *all* of Title VII.[191]

The *Nassar* majority incorrectly placed decisive weight on Congress's adoption and placement of Section 2000e–2(m) to substantiate its conclusion that only status-based discrimination deserved a lowered causation re-

house implicitly condones racism and sexism so long as it is not the causal factor" and that legislation was required to reestablish comprehensive protection against discrimination).

187. *The Civil Rights Act of 1991*, *supra* note 80; *see also Nassar*, 133 S. Ct. at 2545–46 (Ginsburg, J., dissenting) (criticizing the majority for determining the causation standard under § 2000e-3(a) by looking at the *Gross* Court's reading of the ADEA, and therefore ignoring the congressional intent and purpose behind the 1991 Act).

188. Civil Rights Act of 1991, H.R. 1, 102d Cong. § 2(b)(2) (1991) (enacted).

189. *Nassar*, 133 S. Ct. at 2538 (Ginsburg, J., dissenting) (quoting H.R. REP. NO. 102-40, pt. 2, pp. 2–4 (1991)).

190. The addition of § 2000e-2(m) rejected the proposition established in *Price Waterhouse* that an employer could discharge his liability by offering some legal reason for a contested employment decision by codifying an employment action as unlawful any time discrimination is found to play a "motivating" role in a decision. *Compare* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) ("We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* Burrage v. U.S., 134 S. Ct. 881 (2014), *with* 42 U.S.C. § 2000e-2(m) (2012) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). *See The Civil Rights Act of 1991*, *supra* note 80 ("[I]n response to *Price-Waterhouse*, the Act provided that where the plaintiff shows that discrimination was a motivating factor for an employment decision, the employer is liable for injunctive relief, attorney's fees, and costs (but not individual monetary or affirmative relief) even though it proves it would have made the same decision in the absence of a discriminatory motive.").

191. *See Price Waterhouse*, 490 U.S. at 241 & n.7 (stating that "'because of' do[es] not mean 'solely because of'" and noting that "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" (quoting 110 CONG. REC. 2728, 13837 (1964))).

gime.[192] The Majority mischaracterizes congressional intent when it looks to the congressional amendment of Section 2000e–2(m) as signaling Congress's intent to weaken Title VII when, in fact, it was explicitly meant to strengthen the status-based discrimination protections.[193] The placement is not dispositive: the Court fails to mention that Section 2000e–2(m) was placed in Section 2000e–2 as a direct response to *Price Waterhouse*, which modified the liability scheme therein.[194] Congress's failure to amend Section 2000e–3 with a similar provision explicitly stating the governing causation standard is not an implicit signal that tort law principles of but-for causation should govern.[195]

As Justice Ginsburg wrote in her *Nassar* dissent, the 1991 Act was passed to restore Title VII protections that had been curtailed by the Court's aggressive, anti-employee jurisprudence.[196] Congress's amendments were the result of the decision in *Price Waterhouse*, wherein the Court said that an employee who raised a claim under Section 2000e–2(a) could prevail by showing that an impermissible motive was a motivating factor in the employment decision but that an employer could discharge its liability if it proved that it would have taken the same action in the absence of that impermissible motive.[197]

Section 2000e–2(m) codified the "motivating factor" proof scheme advocated by the Court, whereas Section 2000e–5(g)(2)(B) rejected the liability scheme devised by the Court and prevented an employer from dis-

192. *See Nassar*, 133 S. Ct. at 2528 (majority opinion) ("As actually written, however, the text of the motivating-factor provision, while it begins by referring to 'unlawful employment practices,' then proceeds to address only five of the seven prohibited discriminatory actions—actions based on the employees status, *i.e.*, race, color, religion, sex, and national origin. This indicates Congress' intent to confine that provision's coverage to only those types of employment practices. The text of § 2000e-2(m) says nothing about retaliation claims.").

193. *The Civil Rights Act of 1991*, *supra* note 80; *see also* Heywood v. Samaritan Health Sys., 902 F. Supp. 1076, 1080–81 (D. Ariz. 1995) (showing a congressional report stating that *Price Waterhouse* implicitly condones racism and sexism so long as it is not the causal factor and finding that "[l]egislation is needed to restore Title VII's comprehensive ban on all impermissible consideration of race, color, religion, sex or national origin in employment" (quoting H.R. REP. NO. 102-40, pt. 1, at 47 (1991))).

194. There is no evidence to believe that in attempting to restore and strengthen discrimination protections, Congress purposely avoided providing retaliation with a similar standard; rather, Congress spoke directly to the substance of what *Price Waterhouse* changed. *See* Green v. McDonnell Douglas Corp., 463 F.2d 337, 341 (8th Cir. 1972) (noting that "[t]he legislative history of Title VII provides us with no guidance as to the scope of the protection afforded by [the retaliation provision]."). In fact, the Court faced the issue of causation under § 2000e-3 for the first time in *Nassar*. 133 S. Ct. at 2523.

195. *Nassar*, 133 S. Ct. at 2543 (Ginsburg, J., dissenting).

196. *Id.* at 2538; *see also* Kenny, *supra* note 149, at 1035–36 ("Congress responded [to *Price Waterhouse*] in 1991 by amending the discrimination provision of Title VII to create a burden-shifting framework even *more* friendly to employees than the *Price Waterhouse* scheme.").

197. Kenny, *supra* note 149, at 1035–36.

charging its liability. Instead, Section 2000e–5(g)(2)(B) limited the type of relief the employee may collect to declaratory or injunctive relief, and attorney's fees and costs.[198] In codifying the lowered "motivating factor" causation standard and in superseding *Price Waterhouse*'s liability formulation, Congress's intent was clear that employers should be held responsible when an impermissible motive plays any role, no matter the size, in an adverse employment decision.[199] Congress's amendments sought to rectify the consequences of *Price Waterhouse*; there was no need to clarify the causation standard under Section 2000e–3(a) because it was not at issue.[200]

Although the 1991 Act does not speak to retaliation, those amendments do reveal Congress's conception of the importance of Title VII's protections, specifically, Section 2000e–5(g)(2)(B).[201] In pointedly supplanting the *Price Waterhouse* liability scheme through Section 2000e–5(g)(2)(B), Congress intended to provide additional protections to employees.[202] That particular amendment provides for the award of attorneys' fees if contributing causation is proved, in spite of any liability-limiting proof the employer later proffered.[203] This decision evidences Congress's intent to incentivize litigation, making it a feasible remedial mechanism for employees who encounter discrimination, and thereby providing comprehensive protections and remedies for employees.[204] Importantly, the remedial mechanisms in the statute depend on retaliation protections, so that employees feel safe in pursuing those claims.[205] Surely Congress would not have intended to incentivize employees to contest illegal employment practices and then leave them vulnerable with an impotent scheme of retaliation protections.

198. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2006 & Supp. 2012) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).").

199. *Nassar*, 133 S. Ct. at 2539 (Ginsburg, J., dissenting) (citing H.R. REP. NO. 102–40, pt. 1, at 18, pt. 2, at 45–48 (1991)).

200. *See supra* note 194 and accompanying text.

201. *See* text accompanying *infra* notes 202–204.

202. *See Nassar*, 133 S. Ct. at 2539 ("'If Title VII's ban on discrimination in employment is to be meaningful . . . victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions.'" (quoting H. R. REP. NO. 102-40, pt. 1, at 18, pt. 2 at 45–48 (1991))).

203. *See supra* note 198.

204. Harper, *supra* note 127, at 73.

205. *See supra* Part IV.C.1.

2. The But-For Test Negates the Purpose of Retaliation Protections as Described in the Court's Own Retaliation Jurisprudence

In its own words, the Court's past jurisprudence drives the idea that discrimination and retaliation protections are intertwined, and the success of each depends on the efficacy of the other.[206] Moreover, the Court's jurisprudence evinces its understanding that proving and remediating retaliation are of paramount importance in securing the guarantees against all forms of discrimination.[207] As status-based and retaliation protections are related, it follows that they must be evaluated and proved according to similar schemes in order to adequately protect employees.[208] The *Nassar* Court erred when it disregarded this logic and applied a different, more stringent standard to prove retaliation claims.[209] By doing so, employees are effectively foreclosed from successfully defending against retaliation, which in turn limits their ability to defend against other forms of discrimination.[210]

As Justice Ginsburg argued in her *Nassar* dissent, proscriptions on discrimination and retaliation share a "symbiotic relationship."[211] Prior to *Nassar*, the Court read them together, because they function in tandem.[212] The Court's own language demonstrates that retaliation is inextricably linked to status-based discrimination.[213] In a long history of decisions, the Court repeatedly articulated this belief, holding that: "Plainly, effective enforcement [of the antidiscrimination provisions can] thus only be expected if employees [feel] free to approach officials with their grievances";[214] "'[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination'";[215] and "[r]etaliation against a person because [he] has complained of sex discrimination is an-

206. *Nassar*, 133 S. Ct. at 2534–35, 2537–38.

207. *Id.*

208. *Id.* at 2434–35, 2537–38, 2546.

209. *See id.* at 2535 ("Today's decision . . . drives a wedge between the twin safeguards in so-called 'mixed motive' cases. . . . In so reigning in retaliation claims, the Court misapprehends what our decisions teach: Retaliation for complaining about discrimination is tightly bonded to the core prohibition and cannot be disassociated from it.").

210. *Id.*

211. *Id.* at 2537.

212. *Id.* at 2535, 2537–38.

213. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59, 64 (2006) ("Title VII's antiretaliation provision forbids employer actions that 'discriminate against' an employee (or job applicant) because he has 'opposed' a practice that Title VII forbids or has 'made a charge, testified, assisted, or participated in' a Title VII 'investigation, proceeding, or hearing.'" (quoting 42 U.S.C. § 2000e-3(a) (2006 & Supp. 2012))).

214. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

215. Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tenn., 555 U.S. 271, 279 (2009) (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)).

other form of intentional sex discrimination."[216] Because discrimination and retaliation are often encountered together, they should be proved together.[217]

The Court described this symbiotic relationship best in *Burlington Northern & Santa Fe Railway Co. v. White*:

> The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.[218]

In addition, retaliation is considered a form of discrimination,[219] and those who are retaliated against should be regarded as members of a protected class.[220] Enforcement of antidiscrimination cannot succeed without protection from retaliation.[221] These two protections cannot be divorced from each other.

Moreover, the Court's past consideration of Title VII's retaliation protections indicates its belief in their consequence and their necessity, which makes *Nassar*'s nearly impracticable causation formulation all the more problematic.[222] Raising the causation standard is at odds with the Court's past treatment of retaliation.

The retaliation provisions of Title VII have been construed as far-reaching: as held in *Burlington Northern*, the retaliation protections even extend beyond the workplace.[223] In *Burlington Northern*, the Court interpreted Title VII's retaliation protections to be expansive, not just limited to the workplace, and denounced a "limited construction" of the retaliation protections.[224] Therein the Court wrote, the retaliation statute's "'primary

216. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005).

217. *See Nassar*, 133 S. Ct. at 2534–35, 2537–38, 2546 (Ginsburg, J., dissenting) ("The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The antiretaliation provision seeks to prevents harm to individuals based on what they do, i.e., their conduct.").

218. *Burlington*, 548 U.S. at 63.

219. *Id.* at 59.

220. CBOCS West, Inc. v. Humphries, 553 U.S. 442, 457 (2008) (holding that retaliation for race discrimination is itself discrimination based on race).

221. *Nassar*, 133 S. Ct. at 2535, 2537 (Ginsburg, J., dissenting) (citing *Burlington*, 548 U.S. at 63).

222. *See supra* Part IV.A.

223. *Burlington*, 548 U.S. at 63–64.

224. *Id.*

purpose'" is "'[m]aintaining unfettered access to statutory remedial mechanisms.'"[225]

In *Burlington Northern*, the Court made known that the protections of Title VII's retaliation provisions not only apply to those individuals currently employed, but also to former employees seeking redress against a former employer for its postemployment actions.[226] In expanding the scope of these protections to the largest possible class of individuals, the Court believed that it preserved access to Title VII's remedial mechanisms against retaliation in order to protect the entire statute's substantive guarantees.[227] The Court again noted that the primary purpose of antiretaliation protections is to maintain uninhibited access to the statutory remedial mechanisms that protect against other forms of discrimination.[228]

The Court's past jurisprudence concerning retaliation is at odds with the *Nassar* formulation of causation. In the past, the Court has shown that it believes employees should have unfettered access to remedial mechanisms; however, post-*Nassar*, those aggrieved employees will find themselves disadvantaged and unable to protect themselves or their coworkers through retaliation claims.[229] To apply a but-for test to a retaliation claim will ensure a retaliation claim's failure, and thus be counterproductive to achieving the purpose of the retaliation protections. Because retaliation claims are unlikely to succeed under the but-for test, it discourages employees from raising these claims, leaving them no redress from retaliation.[230] For these reasons, the *Nassar* causation formulation is strikingly at odds with the Court's past decisions that proclaim the consequence of retaliation protections.[231]

VI. CONCLUSION

In *University of Texas Southwestern Medical Center v. Nassar*, the U.S. Supreme Court held that retaliation claims under Title VII's Section 2000e–3 "must be proved according to traditional principles of but-for cau-

225. *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

226. *Id.* at 64, 67.

227. *See Robinson*, 519 U.S. at 346 ("According to the EEOC, exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims."). Notably, this decision was decided by a unanimous court.

228. *Id.* at 346.

229. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534–35 (2013) (Ginsburg, J., dissenting).

230. *Id*.

231. *See supra* Part IV.C.2.

sation, not the lessened causation test stated in [Section] 2000e–2(m)."[232] In so holding, the Court conflated different standards of causation, ultimately advancing an impracticable standard to govern retaliation claims.[233] In addition, the Court's decision is inconsistent with the Court's prior jurisprudence and the congressional intent behind Title VII.[234] As a result, *Nassar* severely impairs the antidiscrimination and antiretaliation workplace protections afforded by Title VII.[235]

232. *Nassar*, 133 S. Ct. at 2533; *see also supra* Part III.

233. *See supra* Parts IV.A–B.

234. *See supra* Parts IV.C–D.

235. *See supra* Part IV.